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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 391

THE PEOPLE OF THE STATE OF CALIFORNIA, on the Relation of ARDY V. BARTON,
Petitioner,

vs.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a foreign corporation, and ASSOCIATED INDEMNITY CORPORATION, a domestic corporation,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTIONS PRESENTED.

1. Whether section 95 of the California Penal Code, providing punishment for a person "who corruptly attempts to influence a juror," is to be construed as applying to a generalized discussion of excessive awards in negligence cases published as advertisements in "Life" and "The Saturday Evening Post."

2. Whether section 4690 of the California Corporations Code and sections 803 and 809 of the California Code of Civil Procedure are to be construed to permit quo warranto proceedings against corporations "'for dissolution, fine, restraining order, etc., or any combination of these remedies'"[1] to stop further publication of advertisements protesting generally excessive awards in negligence cases.

STATUTES INVOLVED.

The statutes involved, the provisions of which are set out in full in the appendix to this brief, are:

Calif.Pen.Code, sec. 95;

Calif.Corp.Code, sec. 4690;

Calif.Code Civ.Proc., secs. 803, 809.

STATEMENT OF THE CASE.

The respondent insurance companies caused to be published in various nationally distributed magazines, including "Life" and "The Saturday Evening Post," advertisements relating generally to the subject of excessive jury verdicts (Opinion, Pet., Appx., pp. 1-2).

The relator, Barton, in the name of The People of the State of California, filed an amended petition in *quo warranto* in the state court alleging the publication of the advertisements (Opinion, Pet., Appx., pp. 2-5). The amended petition also alleged that one Hazel Engelman,

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[1]Opinion, Pet., Appx., p. 6.

then serving as a juror, read and discussed one of said advertisements and "thumbtacked part of" said advertisement on a juryroom wall.

The petition charged that respondents had violated California Penal Code section 95, relating to attempts corruptly to influence jurors, and on that ground sought forfeiture of respondents' corporate rights under the California *quo warranto* statutes.

The respondents filed a general demurrer to the amended petition on the grounds, among others, that (1) the petition sought to violate and suppress respondents' right of freedom of speech and of the press guaranteed by (a) the Constitution of the United States and (b) the Constitution of the State of California; and (2) the facts alleged were insufficient to show (a) a violation of Penal Code section 95, or (b) grounds for a proceeding in *quo warranto*[2] (Opinion, Pet., Appx., p. 6). The demurrer was sustained with leave to amend. Petitioner declined to amend and a judgment of dismissal was entered.

The California District Court of Appeal affirmed the judgment of dismissal. The Supreme Court of California denied a hearing.

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[2]In its petition for a writ of certiorari petitioner states: "The respondent insurance companies filed a demurrer on the ground of Constitutional protection of free speech and free press. The demurrer was sustained" (Pet., pp. 4-5). Respondents' demurrer was not so limited. (See Demurrer of Defendants to First Amended Petition in Quo Warranto.)

ARGUMENT.

A. THE DECISION BELOW RESTS UPON ADEQUATE NON-FEDERAL GROUNDS OF DECISION.

1. The District Court of Appeal held that respondents' acts did not violate section 95 of the California Penal Code. This decision rests upon the construction of the state statute. Petitioner's theory was that respondents, by publishing the general advertisements, had violated section 95 of the California Penal Code, and that because of this violation of the Penal Code *quo warranto* lay against respondents under section 4690 of the California Corporations Code and sections 803 and 809 of the California Code of Civil Procedure.[3] Basically, therefore, as petitioner itself says, the cause of action "depends upon whether the insurance companies have violated the laws of the State" (Pet., p. 4).

After considering an earlier California decision construing section 95 (*People v. Connors* (1924) 70 Cal.App. 315, 233 Pac. 362 (Opinion, Pet., Appx., pp. 13-14)), the court held that section 95 was limited to attempts to influence jurors in specific pending cases, a situation not present in the advertisements in question here. The court found (Opinion, Pet., Appx., p. 13):

> "The advertisements here in question amount to a generalized discussion of a particular topic—the

[3]Respondents contended in the state court that, as a matter of law, neither section 4690 of the California Corporations Code nor sections 803 and 809 of the California Code of Civil Procedure authorize this proceeding for forfeiture of their corporate rights, even if their acts constituted a violation of section 95 of the Penal Code. This point was not passed upon by the District Court of Appeal.

claimed excessive awards in negligence cases. There is no effort made to influence a particular decision."

In construing the California statute the state court considered the free speech and free press guarantees in both the Federal and state constitutions—and necessarily would have been required to base its judgment on a decision of those questions had it found the statute applicable. However, its ultimate decision rested upon the construction of the statute, and that construction is binding upon this court (*Albertson v. Millard* (1953) 345 U.S. 242, 244; *Beauharnais v. Illinois* (1952) 343 U.S. 250, 253; *Kovacs v. Cooper* (1949) 336 U.S. 77, 85).

2. As just noted, the state court gave careful consideration to the constitutional questions relating to freedom of speech and freedom of the press but placed its ultimate decision on the construction of the state statute. However, even if it were considered that the judgment rested upon the decision of the constitutional issues, it would rest equally on state and Federal constitutional provisions and thus would be supported by an adequate non-Federal ground of decision (*Lynch v. New York* (1934) 293 U.S. 52[4]).

In referring to the constitutional provisions involved, the state court laid equal stress upon both state and

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[4]Under the facts stated in the following pages of this brief, *Minnesota v. National Tea Co.* (1940) 309 U.S. 551 and like decisions are inapplicable.

Federal constitutions.[5] In its opinion the court said (Pet., Appx., pp. 12-13):

> "It must also be remembered that appellant in this proceeding seeks to restrain respondents from further utterance of their sentiments on claimed excessive jury verdicts or to oust them from carrying on their corporate business in the State of California. Manifestly, this is an attempt at prior restraint upon publication and in essence amounts to censorship, denounced by the state and federal Constitutions in their protection of freedom of speech and press. • • • We are persuaded that the *quo warranto* statutes in this state deal with forfeiture and suppression of corporate rights, and not with publications *per se*, and their use is not permitted to effect restraint upon publication—which is the essence of censorship."

In support of this ruling the court cited not only Federal cases construing the Federal Constitution but also state cases construing the provisions of the Constitution of California. Among others, it relied upon the early deci-

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[5] "• • • we shall first give consideration to respondents' claim that their demurrer was properly sustained because this proceeding constitutes a form of prior restraint upon publication barred by the free speech and free press provisions of the federal and state Constitutions (U. S. Const., Amend. I and XIV, §1; Cal. Const., art. I, §9)" (Opinion, Pet., Appx., p. 7).

"• • • the framers of our Constitution and Bill of Rights, as well as those who brought into being our own California Constitution, recognized" etc. (Opinion, Pet., Appx., p. 7.)

"Manifestly, this is an attempt at prior restraint upon publication and in essence amounts to censorship, denounced by the state and federal Constitutions in their protection of freedom of speech and press" (Opinion, Pet., Appx., p. 12).

"On the basis of the facts alleged in the amended petition, the maintenance of *quo warranto* proceedings against respondent must be held, under the authorities herein cited, to amount to an infringement upon rights guaranteed respondents by the federal and state Constitutions" (Opinion, Pet., Appx., p. 15).

sion in *Dailey v. Superior Court* (1896) 112 Cal. 94, 97, 44 Pac. 458 (Opinion, Pet., Appx., p. 12), where the Supreme Court of California held that restraints such as those sought here to be imposed would infringe "upon rights guaranteed to every citizen by section 9, article I, of the constitution of this state."

Clearly, therefore, the ruling of the District Court of Appeal, in so far as it may be considered as resting upon decision of constitutional questions, is independently based upon the provisions of the Constitution of the State of California.

B. THE DECISION OF THE STATE COURT IS CORRECT AND IS NOT IN CONFLICT WITH BEAUHARNAIS v. ILLINOIS, 343 U.S. 250.

For the reasons stated in the opinion of the California District Court of Appeal, the right of respondents to publish in a magazine of wide circulation their sentiments on a matter of general public interest is, we submit, clearly protected by the free speech and free press guarantees of the state and Federal constitutions. Petitioner's contention that the decision of the court below is in conflict with the decision in *Beauharnais v. Illinois* (1952) 343 U.S. 250, is without merit.

In the *Beauharnais* case this court was concerned with admittedly libelous false charges that certain persons were rapists, robbers, carriers of knives and guns and users of marijuana. It held such libelous utterances were not within the area of constitutionally protected speech. Quoting from *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 571-572, the court said (343 U.S. 255-257):

"'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut,* 310 U.S. 296, 309-310.'"

The advertisements concerning excessive jury verdicts challenged in this case do not come within the "well-defined and narrowly limited classes of speech" above referred to. Petitioner cannot seriously contend that "the lewd and obscene, the profane, the libelous, [or] the insulting or 'fighting' words" can be found in these advertisements. Whether one agrees or disagrees with the ideas expressed in the advertisements, they are indubitably a part of any exposition of a problem of wide concern. Careful research fails to reveal a single instance in which a court anywhere has sustained an attempt either to suppress or punish comment of this kind. On the contrary, three other courts have considered, in attempted contempt proceedings, the identical advertisements here involved, and in each case (although the appeals turned on

jurisdictional grounds) the comments of the court indicate complete agreement with the conclusions of the state court in the case at bar.

Hendrix v. Consolidated Van Lines (1954) District Court, Sedgwick County, Kansas, Case No. A-43376; appeal dismissed (1954) 176 Kan. 101, 269 P.2d 435;

Hoffman v. Perrucci (E.D.Pa. 1953) 117 F.Supp. 38; appeal dismissed (3 Cir. 1955) 222 F.2d 709;

United States v. American Machinery Co. (E.D. Wash. 1953) 116 F.Supp. 160.

CONCLUSION.

The decision below is independently supported by non-Federal grounds. It is clearly correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Dated: San Francisco, California,
September 29, 1955.

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(Appendix Follows.)